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IN THE

# Supreme Court of the United States

October Term, 1946
No. 1432

JACOB LOUIS AUERBACH,

*Petitioner,*

*vs.*

PHILIP FLEMING, Administrator, Office of Temporary Controls,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

# Supreme Court of the United States

October Term, 1946
No. .....

JACOB LOUIS AUERBACH,

*Petitioner,*

*vs.*

PHILIP FLEMING, Administrator, Office of Temporary Controls,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

*To the United States Emergency Court of Appeals, and to the Honorable Chief Justice Vinson and to the Honorable Associate Justices of the United States Supreme Court:*

Your petitioner, Jacob Louis Auerbach, petitions this Honorable Court for a Writ of Certiorari directed to the United States Emergency Court of Appeals to review the judgment and order of that court dismissing the complaint of the petitioner.

## Jurisdiction.

The jurisdiction of this court is invoked under Title 50, App., Sec. 924(d), which provides that:

> "Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 Edition, Title 28, Sec. 347)."

The judgment and opinion of the court was filed May 1, 1947.

## Decision of the Court Below.

The decision of the Emergency Court of Appeals has not been printed but is a part of the record being prepared by the Emergency Court of Appeals.

## Statutes and Regulations Involved.

The Emergency Price Control Act of 1942, as amended;

Act of January 30, 1942, C26, 56 Stat. 23 as amended June 20, 1945;

C214, 59 Stat. 306 and as amended July 25, 1946, C671, 60 Stat. 664.

The statutory definition of "rent" as defined in the Emergency Price Control Act of 1942, subdivision (g) is as follows:

> "The term 'rent' means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accomodation."

The regulations complained of are as follows:

> § 9 *Evasion.* (a) *General.*[1] The maximum rents and other requirements provided in this regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing accommodations, or by tying agreement[1a] or otherwise.
>
> § 13 *Definitions.* (a) When used in this regulation the term:
>
> * * * * * * * *
>
> (5) "Persons" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of

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[1]Paragraph designated (a) and headnote added by Amdt. No. 44,1-8-45.

[1a]Words "or by tying agreement" added by Amdt. No. 44,1-8-45.

any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing.

* * * * * * * *

(8) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

* * * * * * * *

(10) "Rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or for transfer of a lease of such accommodations.

§ 2 *Probition against higher than maximum rents*—(a) General prohibition. Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

**Statement and Summary of Facts.**

Jacob Louis Auerbach is a duly licensed real estate agent in the City of Los Angeles. In 1944, due to the housing shortage and the large amount of time spent by persons looking for housing facilities, he conceived the idea of starting a "Housing Service" to locate housing facilities for tenants. He conferred with his attorney, who in turn talked to people in the Rental Division of the Los Angeles Office of Price Administration, and he was advised by his attorney there was no statute, regulation or order which forbade the locating of housing facilities for tenants and charging the tenant a fee for that service.

Auerbach then opened up office. He put in a telephone, sent out letters to apartment house managers, and advertised in magazines asking these managers to notify him when and if they might have housing facilities available and he offered to compensate these managers or other persons for this information.

He also advertised his housing facilities for tenants and offered to sell information to tenants as to available housing facilities.

He not only got all the information regarding the tenants and the type of place that they would like or could or would use, but also he frequently located facilities for them at a rental price less than they had anticipated paying or were willing to pay.

The rental actually charged the tenant was the O.P.A. ceiling rental. Auerbach collected from the tenant a fee

for rendering this service and in turn paid his informant, whether it was the manager or owner of the housing facility or another person, a fee for giving him the information and keeping him advised. At no time was this fee paid either to Auerbach or by Auerbach as rent but it was actually for the information which was furnished to him.

One of the couples who came to him was Ted and Elaine Bunn. For more than a month they had been seeking housing accommodations unsuccessfully. Mr. Auerbach informed Mr. and Mrs. Bunn that he believed he could locate a place for them and that the fee for locating the place would be $60.00, for his, Auerbach's service. Bunn agreed to pay the $60.00. A contract was signed between Auerbach and Mr. and Mrs. Ted Bunn.[2]

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[2]One of the contracts generally signed by Mr. Auerbach and his client was as follows:

LETTER AGREEMENT

Mr. J. L. Auerbach
Real Estate Broker
5200½ Wilshire Blvd.
Los Angeles, California

Mr. Auerbach:

I understand that you are engaged in the business of furnishing information relating to available rental housing accommodations. I understand that you are not acting as an agent for any landlord.

In the event that I accept any rental housing accommodation concerning which you have divulged any information to me, (it being understood however that you are under no obligation to divulge any such information to me) I will pay you a fee in the sum of..... ($.....) Dollars.

I acknowledge that you have divulged to me the following information: .....

To secure payment of said fee, I herewith hand you a check in the said sum which you may deposit in your account. Acceptance of a housing accommodation shall be ef-

Auerbach received information from the manager of an apartment house that there was an available housing facility there and he sent Ted and Elaine Bunn to get the housing facility. The available apartment rented for $32.50 per month. Ted and Elaine Bunn paid the $32.50 to the apartment owner, which was the maximum price of the rent. They have continued to live in this apartment ever since that time. There were never any over-charges paid to the apartment owner by Ted or Elaine Bunn. The rent was always paid to the apartment owner or manager and never to Auerbach.

Mr. Auerbach did not show the housing facilities, did not see the apartment and did not advise Ted and Elaine

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fected and conclusively presumed by any of the following acts:

a. By giving a deposit to the landlord. I shall not be relieved from liability if I thereafter recover or accept the return of such deposit, or in any manner avoid payment thereof, with or without the landlord's consent.
b. By advising the landlord that I accept such accommodation.
c. By advising you that I accepted such accommodation.
d. By any other act constituting an acceptance.

I understand that information concerning available housing accommodations is, due to the current housing emergency, of unique value and accordingly I agree that I will keep and hold all information imparted by you confidential and will not disclose the same to any person. If I hereafter make a disclosure thereof to any person, you may retain the deposit as liquidated damages, or in the event of its refund I will forthwith pay said specified sum as liquidated damages.

If I do not accept any housing accommodation concerning which you have divulged information to me, you will, following the clearance of my check or draft, refund the amount thereof. If I thereafter accept any of the housing accommodations concerning which you have divulged information to me, I shall forthwith pay you the fee above specified.

In the event that you institute suit against me for the purpose of enforcing payment of the said check, or the fee

Bunn whether they should or should not rent the apartment. He collected $60.00, however, from Ted and Elaine Bunn for the service and information of locating the apartment.

To compensate the manager of the apartment house, who also happened to be the owner, for the information Auerbach, without knowledge or participation in any way by the tenant, paid $15.00.

Another transaction was carried on for Mr. and Mrs. Wm. J. Terberg. They too had been searching for an apartment for a considerable period of time and they contacted Mr. Auerbach, who located them a housing

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above specified, or the liquidated damages above provided, I will pay you such sum for attorneys' fees as the court may adjudge reasonable.

Dated: Los Angeles, California, this .....day of ....., 194.....

(Name) .....

Address: Phone:

I accept upon the terms and conditions above stated.

.....

J. L. AUERBACH, Broker

I hereby demand the return of the deposit above described, immediately following the clearance of my check or draft as above provided, and do represent, warrant and covenant as follows:

1. I have not accepted, as above defined, any of the housing accommodations concerning which you have divulged information.

2. I have not disclosed any of said information to any other person.

3. Your compliance with this demand does not release me for any liability arising out of the above agreement.

.....

.....day of .....194.....

I acknowledge that you have on this date divulged the following further information to me:.....

.....

.....

accommodation for $29.00 per month. His fee from them was also $60.00.

The testimony shows this amount was far less than Terberg was able to earn in the same time he had spent or would spend in trying to locate a housing facility; and also, that the amount of the rental of the accommodation located by Auerbach was less than the tenant intended to pay. Thus, it was a double saving through Auerbach's efforts.

Auerbach likewise received $60.00 as his fee for the information and service which he rendered. He in turn paid the person giving him the information $15.00, but without any participation on the part of the tenant in any way or without any knowledge on his part of such payment.

More than two years elapsed, during which time the Office of Price Administration was well aware of Auerbach's operation, and on one occasion a civil suit was filed in the State Court and judgment rendered in Auerbach's favor.

In 1946 an indictment was filed in the District Court of the United States charging Auerbach with violation of the Emergency Price Control Act of 1942 and the regulations issued pursuant thereto.

Auerbach was convicted by a jury of two counts and because of a challenge to the validity of the regulation involved, the trial court stayed proceedings pursuant to Title 50, App., Secs. 923(a) and 924, U. S. Codes, and granted leave pursuant to Section 924(e)(1), Title 50, App., U. S. Codes, to test the validity of the regulation in the Emergency Court of Appeals.

The cause was heard on the complaint of Auerbach before the Emergency Court of Appeals on April 7, 1947 at Los Angeles, California, and decided May 1, 1947.

The Emergency Court of Appeals, in its Opinion, held that the words "rent" and "person" and the definition of violation as contained in the Emergency Price Control Act of 1942 were not too vague, indefinite and uncertain to be unconstitutional and in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

The Emergency Court of Appeals also denied the petitioner's challenge that the Regulations as construed and applied in this case were arbitrary and unreasonable and unfair; and denied the challenge that the Regulations denied to the petitioner freedom of speech and of the press, and as construed and applied in this case, it forbade the purchase or sale of information regarding housing facilities by a real estate broker from a landlord or a manager of an apartment facility; and that, as thus construed and applied in this case, it violates the First Amendment to the Constitution of the United States.

**Questions Presented by This Petition.**

(1) Whether a real estate agent in charging a fee and selling information as to the availability of housing facilities violates the Emergency Price Control Act of 1942, as amended, and the regulations issued pursuant thereto, if he pays any portion of his fee to the landlord, or manager, or someone else, for the information furnished to him as to whether a housing facility is available.

(2) Whether the term "rent" as defined by the regulations issued pursuant to the Emergency Price Control Act of 1942 is so broad as to include the payment of any money by a real estate agent for securing information regarding the availability of housing facilities.

(3) Whether the term "person" as set forth in the regulation of the Administrator is not limited by the word "landlord" in the same regulation.

(4) Whether the regulation regarding "evasion" as contained in Regulation 9(a) of the Administrator regarding rent is not too vague, indefinite and uncertain to constitute a valid regulation forbidding the acts of the petitioner.

(5) Whether the regulations, as construed and applied, are not arbitrary and unconstitutional in that they deprive the petitioner of his property and business in violation of the Fifth Amendment to the Constitution of the United States?

(6) Whether the regulations, as construed and applied in this case, are not in violation of the First Amendment to the Constitution of the United States in that it forbids freedom of speech and freedom of press in respect to the sale of information.

**Reasons for Allowing the Petition.**

The Emergency Court of Appeals has decided important questions of Federal Law, which widely affect real estate brokers and agents throughout the country.

Since the housing shortage, real estate brokers and agents have had to look to tenants rather than to landlords for compensation. Also, they have had to get information regarding housing facilities to aid tenants who would have to take too much time off from their jobs or were physically unable to locate such facilities.

The effect of the opinion of the Emergency Court of Appeals is to prevent real estate agents engaged in a specialized line of business from getting information or selling that information or their services in connection with obtaining housing facilities.

The effect of the decision, we think, is far more serious to the tenant than to the landlords, who now have no trouble getting renters and do not need the services of real estate agents.

If real estate agents cannot buy or pay for information regarding available housing facilities it would prevent them from serving needy tenants.

**Importance of Questions Raised.**

The case therefore raises important questions of Federal law not heretofore decided by this court and involves important questions of Constitutional law not heretofore decided by this court.

The case, we believe, is also in conflict with the applicable law and with the law as decided by this court in *M. Krause & Bros. v. United States,* 327 U. S. 614.

The case also involves the questions as to whether the definition of "rent" and other definitions in the regulation regarding rent, inherently and as construed and applied in this case, violate the First and Fifth Amendments to the Constitution

**Cases and Statutes Believed to Sustain Jurisdiction.**

The Emergency Price Control Act of 1942, as amended; Title 50, App., Sec. 924(d);

*M. Krause & Bros. v. United States,* 327 U. S. 614, 90 L. Ed. 894;

*Lockerty v. Phillips,* 319 U. S. 182;

*Yakus v. U. S.,* 321 U. S. 414;

*Bowles v. Willingham,* 321 U. S. 503.

Respectfully submitted,

MORRIS LAVINE,

*Attorney for Petitioner.*

IN THE

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OCTOBER TERM, 1946.

No. .....

JACOB LOUIS AUERBACH,

*Petitioner,*

*vs.*

PHILIP FLEMING, Administrator, Office of Temporary Controls,

*Respondent.*

## BRIEF IN SUPPORT OF PETITION.

*To the Honorable Chief Justice Fred Vinson and to the Honorable Associate Justices of the United States Supreme Court:*

### Opinion of the Court Below.

The opinion of the United States Emergency Court of Appeals has not yet been printed. It is contained in the record being prepared by the said court.

### Statement of the Case.

Reference is made to the Statement and Summary of Facts in the Petition.

## Jurisdiction.

Reference is made to the Jurisdiction statements in the Petition.

## Statutes and Regulations Involved.

Reference is made to the Statutes and Regulations in the Petition.

## Specification of Errors.

### I.

The Emergency Court of Appeals erred in holding that the definition of "rent" and the definition of "evasion" as set out in the regulation are not so vague, indefinite and uncertain as to violate the Fifth Amendment to the Constitution of the United States.

### II.

The Emergency Court of Appeals erred in holding that the definitions of "rent" and of "evasion" as contained in the regulation of the Administrator do not, as construed and applied to this case, violate the First Amendment to the Constitution of the United States in depriving the petitioner of his right of freedom of speech and freedom of the press; and in holding that he could be prevented from selling information regarding housing facilities or buying information regarding housing facilities without such prohibition offending the First Amendment to the Constitution of the United States guaranteeing the freedom of speech and the freedom of the press.

### III.

The Emergency Court of Appeals erred in holding that the regulation did not purport to deprive the petitioner of

the right to do business as a real estate broker and that the regulation, inherently and as construed in this case, in no manner interfered with the constitutional right of the petitioner.

## IV.

The Emergency Court of Appeals erred in holding that the definition of "rent" as construed by it does not violate the Fifth Amendment to the Constitution of the United States.

The Emergency Court of Appeals, in its opinion, broadly holds that any payment of any money whatsoever, in any manner whatsoever, to a landlord violates the Emergency Price Control Act if the landlord has otherwise received from a tenant the maximum rent permitted by law. But, it is not the payment of money but the character and purpose of the payment that should determine whether it constitutes a violation of the law. The payment of money to a landlord by a real estate agent, who is in a specialized line of business, for information which the real estate agent is seeking, or has sought, and without any contractual agreement or understanding with the tenant that the money is to be paid for rent or as a bonus or extra payment, would not constitute a violation of the Emergency Price Control Act or an evasion.

The Emergency Court of Appeals, however, stated that if any money is paid to a landlord, no matter how or in what manner, that it then becomes "rent" within the meaning of the regulation of the Administrator. Thus, while the court says that the regulation purports only to fix maximum rent and to prevent evasion thereof by any

person under any guise; it is concluded that the payment of any sum whatsoever to a landlord by a real estate broker for giving him information, which otherwise he could not secure, constitutes "rent" effectively and certainly ends the power of the real estate agent to secure information.

It is a familiar rule of interpretation that statutes are to receive a reasonable construction:

*U. S. v. Kirby*, 74 U. S. 482, 7 Wallis 482, 19 L. Ed. 278;

*Spradlin v. Royal Mfg. Co.*, 73 F. (2d) 776;

*Magnuson v. Wagner*, 1 F. (2d) 99;

*Safe Deposit & Trust Co. v. Tait*, 3 F. Supp. 562;

*Gen. Investment Co. v. Lake Shore R. R. Co.*, 226 Fed. 976;

*Fields v. U. S.*, 27 App. (D. C.) 433;

*London & Lankershire Indemnity Co. v. Smoot*, 287 Fed. 952, 52 App. (D. C.) 378;

*White v. Hopkins*, 51 F. (2d) 159;

*Tinker v. Modern Broadcast of America*, 13 F. (2d) 130;

*Hane v. Mid-Continent Petroleum Corp.*, 43 F. (2d) 406;

*Factors and Finance Co. v. U. S.*, 56 F. (2d) 902;

*Chester N. Weaver Co. v. Commissioner of Internal Revenue*, 97 F. (2d) 31;

*Ervin v. Alabama*, 80 F. (2d) 432;

*Wilson v. U. S.*, 77 F. (2d) 236;

*Baxter v. McGee*, 82 F. (2d) 695;

*Huff v. Young Poy*, 68 F. (2d) 203;

*Compton & Knowles Loom Works v. White*, 65 F. (2d) 132;

*Donnelly Garment Co. v. International Ladies Garment Workers Union*, 99 F. (2d) 309.

It is presumed that Congress did not intend an absurdity:

*Mallory Coal Co. v. National Bituminous Coal Commission*, 99 F. (2d) 399;

*Smyth v. U. S.*, 92 F. (2d) 900;

*Peper v. Willcutts*, 64 F. (2d) 813;

*Ex parte Washer*, 200 Cal. 598, 254 Pac. 951;

*Red River Broadcasting Co. v. Federal Communication Comm.*, 98 F. (2d) 282;

*Stonega Coke & Coal Co. v. Commissioner of Internal Revenue*, 57 F. (2d) 1030.

A literal application of the law which would lead to absurd consequences should be avoided whenever a reasonable application consistent with the Legislative purpose can be given:

See cases above cited.

The presumption that Congress does not intend absurdities is a strong one:

*Compton & Knowles Loom Works v. White*, 65 F. (2d) 132.

One of the surest tests of statutory construction is whether the interpretation contended for will render the statute rational or absurd:

*International Railway Co. v. U. S.* 238 Fed. 317.

The court must ascertain the true meaning of a statute where a strict construction would lead to injurious or absurd results:

*Darby-Lynde Co. v. Alexander,* 51 F. (2d) 56.

A statute should not be given its apparent literal meaning if that meaning leads to unreasonable, extraordinary, unjust or absurd consequences:

*In re Blaylock,* 31 F. (2d) 612.

It is presumed that Congress did not intend to work an injury or a confiscation, and the regulation will not be given a construction leading to such if the language will reasonably bear any other interpretation:

*Northern Pacific Railway Co. v. U. S.,* 213 Fed. 162;

*Hills v. F. D. McKinnes Co.,* 188 Fed. 1012;

*Toledo Traction Light & Power Co. v. Smith,* 205 Fed. 643;

*Hartley v. Commissioner of Internal Revenue,* 72 Fed. 352;

*Constantine v. U. S.,* 75 F. (2d) 928;

*U. S. v. Kesterson,* 296 U. S. 299, 80 L. Ed. 241, 56 S. Ct. 229;

*Grier v. Kennan,* 64 F. (2d) 605;

*White v. Hopkins,* 51 F. (2d) 159;

*Gutschalk v. Peck,* 261 Fed. 212;

*Rothschild & Co. v. Marshall,* 47 F. (2d) 919.

In accordance with the foregoing principles, the courts so far rely upon the presumption that the Legislature did not intend an absurd, unreasonable or injurious law that in construing a statute they hold that a thing may be within the letter of the statute and not within its spirit:

*Leavenworth Railway Co. v. U. S.*, 92 U. S. 733, 23 L. Ed. 634;

*Missouri K. & T. Railway Co. v. U. S.*, 92 U. S. 760, 23 L. Ed. 645;

*Wilkins v. Leland*, 27 U. S. 267, 2 Peters 267, 7 L. Ed. 542;

*Indianapolis & St. Louis Railway Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898;

*Smythe v. Fiske*, 90 U. S. 374, 23 Wallace 374, 23 L. Ed. 47;

*Raymond v. Thomas*, 91 U. S. 712, 23 L. Ed. 434.

The strict letter of an Act must yield to its evident intent and spirit when necessary to give effect to intent of Congress:

*Fleschmann Construction Co. v. U. S.*, 270 U. S. 349, 70 L. Ed. 624.

It is the duty of the court to restrain the operation of a statute within narrower limits than its words import if the court is satisfied that the literal meaning of the language would extend the statute to cases which the Legislature never intended to embrace in it:

*Moss v. U. S.*, 29 App. (D. C.) 188.

The literal words of a statute will not be followed where it appears that such interpretation would, in view

of the purpose of the statute, lead to absurd or injurious results:

> *Saginaw Broadcasting Co. v. Fed. Communications Comm.*, 96 F. (2d) 554, 68 App. (D. C.) 282.

A sensible construction will be adopted, if possible, though conflicting with dry words:

> *Baltzell v. Mitchell*, 3 F. (2d) 428.

Having the foregoing rules in mind, we submit that the Emergency Court of Appeals has given much too broad a construction to the language "The considerations . . . demanded or received for, or in connection with the use or occupancy of housing accommodation". To receive money for, or in connection with the use of housing accommodations is something very different from receiving money for furnishing information as to when, for what sum, upon what terms, and for what time such accommodations are available. The money so received is a consideration paid to the party who furnishes the information. It is not the receipt of money, as such, that determines whether it is rent—as the Emergency Court of Appeals has so broadly construed—but it is the character and purpose for which the money is used that should be determinative. Here the character and purpose was not rent but the payment for information which it was necessary to secure.

This view is strengthened by the following considerations and illustrations:

(1) The petitioner was a real estate broker or middleman. In order to perform his function, he must neces-

sarily gather information concerning available properties for sale or for rent, including available housing accommodations and must likewise gain information concerning those matters which enter into the desirability of housing accommodations, including the presence or absence of water, gas, light, telephone, sewers, means of transportation, proximity to schools and markets, and various other things which a buyer or tenant will wish to know in buying or renting a piece of property. This knowledge constitutes his stock-in-trade. By reason of the possession of it he becomes qualified to testify as an expert witness concerning the values of such properties or their use. Certainly there could be no violation of the law on his part because of any expenditure honestly made in gaining such information. Expenditure of some sort is necessary on the part of every broker in order to obtain information of the character indicated. Whether that expense be by way of payment directly to those who have the information and are ready to furnish it, or by reason of his own investigation upon the ground that is a matter for his judgment and to be determined by the circumstances of each particular case. His efficiency on the whole depends upon the extent and accuracy of his knowledge concerning such matters. Having gained the knowledge, he must put it to use in order to justify the expenditure. He may do this by acting as an intermediary between the buyer and seller, charging a commission to either, or to both, if both have knowledge of such charge and consent thereto. He may upon the other hand sell the information which he has obtained to those who are desirous of profiting by its use and may make a compensation contingent upon the party to whom he sells the

information, making use of it by renting the property described.

(2) In such cases what the petitioner did was to serve his clients by selling them knowledge which he possessed—knowledge of such character that it enabled the client to enter into a lease which he deemed advantageous. It follows, therefore, that the money obtained by the petitioner was his property. It was the consideration for the service he rendered and the information which he furnished. The title to it passed upon its delivery to him and it became his to do with as he pleased. He might dispose of it according to his whim or caprice. If he chose to pay part of it to those who had made the information accessible to him that was a matter for him alone to consider. It was for his sole determination whether or not he could gain information more advantageously by making such payment.

For these reasons we think that the definition of rent as adopted by the Emergency Court of Appeals is too broad. If that definition stands, then we have this absurdity: that a man may sell the information he possesses and keep the price obtained without committing a crime, but if he compensates in good faith those who furnished him with the information, then he becomes a criminal. Such an interpretation is manifestly unjust and should not, under the authorities cited, be adopted if the language is reasonably susceptible of any other interpretation.

Such other interpretation is reached by limiting the words "consideration demanded or received" to money which was received *for the use or for the occupancy of real estate* as distinguished from money received for

making necessary repairs or for information furnished a broker, who was in touch with tenants desiring to rent such property.

If the term "rent" may be construed as broadly as the Emergency Court of Appeals has held, we have this situation: if the ceiling price for rental of a property is fixed at $45 per month and the landlord rents and receives the $45 per month, the tenant paying the lights, water and gas bills, there has been no violation of the regulation; but if the landlord rents the premises for $50 and contracts to pay the water, light and gas bills, even though they amount to $15 or more per month, he is violating the regulation, although his actual net proceeds in the second instance is less than those in the first instance. Certainly such a construction is absurd, unreasonable and unjust. It is inconceivable that any such consequences could have been intended by Congress when it passed the Price Control Act, or by the Administrator when he framed the regulation under that Act. Yet the absurdity and injustice are inescapable if the broad definition of the term "rent" that the Emergency Court of Appeals has adopted be the true one, for it is undeniable that in the second supposed case the whole sum of $50 is money "received in connection with the use or occupancy of housing accommodations."

Let us take another illustration. A landlord rents premises to a tenant for the ceiling price of $50 per month and undertakes to keep the premises in repair. In another instance the landlord similarly rents premises for $50 per month, that being the ceiling price in both cases, but has a provision in the lease that the tenant shall keep the premises in repairs. In the first instance the

tenant consists of an elderly man and his wife, who are known to be careful in the use of the property they occupy. In the second case, the tenant consists of a man with a large family of children likely to be destructive. The landlord in the second case, providing for the tenant to make all repairs other than those caused by ordinary wear and tear, or damages by the elements, simply protects himself against the added hazard of renting to a family of that character. Yet if the property be damaged and the tenant spends, let us say, $25 in repairing the damages he has caused, there has been a violation of this regulation, for although the landlord has received only $50 in cash, he has received an additional $25 in a "benefit" consisting of the repairs.

Let us take one more illustration. A landlord rents a property for the ceiling price of $50 per month. While occupied by the tenant it is damaged through the latter's negligence, and the damage amounts to $100. The landlord sues for such damages and obtains a judgment against the tenant for the damage thus caused. He collects his judgment and then is prosecuted for a violation of this regulation because under the broad construction adopted, the amount of the damage is a "consideration received in connection with the use and occupancy of housing accommodations."

So when the court says that the language of the provision, to wit, that the word "rent" means any consideration, including any bonus, benefit or gratuity demanded or received for, or in connection with the use or occupancy of housing accommodations, or for the transfer of a lease of such accommodations, we reply that to construe the language "demanded or received for, or in connection

with the use or occupancy of housing accommodations" as broadly as the court has construed it in its opinion, is to stand in opposition to everyone of the cases above cited, and to ignore the fundamental rule that it is the intention of Congress that it be effectuated. It thus casts aside the presumption that Congress did not intend absurd, unreasonable and unjust results, and ignores the duty of the court to restrain the language within narrower limits in order to effectuate the true intent of Congress.

"A laborer is worthy of his hire," and no person can be expected to furnish information and go to the expense and the time and trouble required without being compensated therefor. To construe such compensation as "rent" is to add a new definition to "rent" which Congress never authorized the Administrator to promulgate, and certainly it is not within any definition of any regulation of any rent.

The Emergency Court of Appeals erred in holding in its decision a point raised by us in the Emergency Court that the regulation, inherently and as construed and applied, violates the First Amendment to the Constitution of the United States.

The decision of the Emergency Court of Appeals holds that the receipt of money by an owner or manager of an apartment for any reason whatsoever violates the Emergency Price Control Act of 1942, as amended, and the regulation issued pursuant thereto regarding "evasion". Thus, by a broad and all inclusive construction of this regulation, the court says that a owner or manager (or anyone else for that matter of fact) could not sell information regarding the availability of a housing facility or receive any kind of a fee or payment whatsoever for

the selling of this information for the time and service in supplying this information, because the court says if it construed the regulation otherwise it would make evasion easy. But, the First Amendment to the Constitution of the United States, which guarantees the right of freedom of speech and of the press, is not concerned with matters of evasion as such but concerned with "fundamental personal rights and liberties which lie at the foundation of free government by free men."

*Schneider v. Irvington,* 308 U. S. 147, 84 L. Ed. 155;

*Thornhill v. Alabama,* 310 U. S. 88, 84 L. Ed. 1093;

*Lovell v. Griffin,* 303 U. S. 444;

*National Labor Relations Board v. J. L. Brandeis & Sons,* 145 F. (2d) 556;

*Thomas v. Collins,* 323 U. S. 516, 89 L. Ed. 430.

If, under the guise of a statute and a regulation to control prices, one may be prevented from buying or selling information by such regulation, then indeed freedom of speech and freedom of the press becomes meaningless and all of such acts can be construed by a single Administrator to be an "evasion" with nothing more to define it and thus the constitutional guarantees are legislatively and administratively controlled.

In *Thornhill v. Alabama,* 310 U. S. 88, at page 95, the court said:

> "The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberites which are secured

> to all persons by the Fourteenth Amendment against abridgment by a state. . . . Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions."

The Emergency Court of Appeals also erred in holding that the regulation defining "evasion" was so all inclusive as not to be too vague, indefinite and uncertain, as construed and applied in this case.

> *M. Kraus & Bros. v. United States,* 327 U. S. 614, 90 L. Ed. 894.

The record of the case shows that Auerbach's operations were generally not with the owners of property at all but only with the apartment house managers, who are employees receiving small compensation; and that he advertised to managers and the payments were to the managers of the apartment houses.

It so happened that in the particular instance the manager happened to be the owner of the property but represented herself to Auerbach as the manager, which was also the fact, as she happened to both own and manage the property herself. However, Auerbach's efforts and his seeking of information was from apartment house managers. This is shown by the record of the evidence, advertising literature and the documents on file. It was, therefore, his plan to have persons in that capacity furnish him with the information for which he naturally intended to compensate them for their time and trouble.

The fact is that the payment was generally paid not to the landlord but to his manager or agent, not to the manager or agent for the delivery to the landlord but to such manager or agent as his money, received by him in consideration of the information which he had furnished, and as his property without any limitation upon his right or any equity or lien thereon in favor of the landlord or any other person.

We think the fact that payment was not invariably and, indeed, was not usually paid to the landlord but to another person, who furnished the information, is decisive against the views of the Emergency Court of Appeals that the facts constituted an evasion of the regulation. Since the money did not usually go to the landlord the intent of petitioner obviously was *not* to evade the regulation, but on the contrary, to encourage those who had information concerning rentals to furnish it to him so that he could place it before persons desirous of occupying such property. The court, of course, takes judicial notice of the fact that there is a housing shortage; that to preserve a sound economy it is necessary to bring about a maximum of production. To that end it is important that persons be able to rent properties close to their place of employment. There was not in the conduct of petitioner any evasion by means of an absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commission or other charges, or by modification of the services furnished with housing accommodations. In fact there was no evasion whatever. There was, we repeat, simply a contract under which petitioner paid for information which he received out of the money that he received through the sale of

the information. The intent was not to give the landlord an additional sum above the ceiling fixed by the administrator. That upon occasion he did so was an unavoidable incident to a plan for proper compensation to those who furnished valuable information.

Auerbach's service has been of great value to tenants, particularly those getting out of the military service (like the tenants involved in the present cases) who did not have the time to spend in searching out the housing facilities themselves; who did not have to spend money for gasoline for their automobiles in hunting for a place; and who otherwise were able to get facilities at a lower cost to them through Auerbach's service than they would have had to pay, or expend, in seeking a place themselves.

We do not think Congress intended by the Emergency Price Control Act to forbid this service nor the payment for this service, and that the decision of the Emergency Court of Appeals is contrary to Congressional purposes and intentions and to the Constitutional guarantees challenged by this petition.

Wherefore, your petitioner prays that this Honorable Court grant a Writ of Certiorari to the Emergency Court of Appeals and that it review and reverse the decision of the judgment of the Emergency Court of Appeals.

Respectfully submitted,

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